

Unit Construction Co. Pvt. Ltd. Vs. State Bank of India and ors.

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Court : Kolkata

Decided On : May-07-2012

Judge : I. P. Mukerji

Appellant : Unit Construction Co. Pvt. Ltd.

Respondent : State Bank of India and ors.

Judgement :

ORDER

SHEET TA NO.57 OF 201.CS NO.150 OF 201.CS NO.128 OF 201.TA NO.43 OF 201.IN THE HIGH COURT AT CALCUTTA Ordinary Original Civil Jurisdiction ORIGINAL SIDE UNIT CONSTRUCTION Co.PVT.LTD.Versus STATE BANK OF INDIA & ORS.BEFORE: The Hon'ble JUSTICE I.P.MUKERJ.Date :

7. h May, 2012.

Mr.Anindya Kumar Mitra, senior advocate, Advocate General, Mr.A.Mitra, Ms.R.Kajaria, Mr.J.Chowdhury, Mr.S.Ghoshappear.

Mr.S.K.Sengupta, Mr.B.Dutt, Mr.S.Senguptaappear.

Mr.R.Bhattacharyya, Mr.S.B.Sarafappear.

The Court : Some very substantial points have been raised in this application.

The first, on behalf of Union of India by Mr.Sengupta.

He draws my attention to clause 25 of the contract between the parties which says that the disputes between them are to be resolved in arbitration.

He submits that by virtue of that clause this suit and application are incompetent.

Mr.A.K.Mitra, learned Advocate General submits that an application under Section 8 of the Arbitration and Conciliation Act, 1996 has not been filed by the Union of India for reference of the parties to arbitration.

Unless orders are passed to that effect, the Court can keep on exercising jurisdiction in the suit.

I accept the latter contention.

Unless an order is passed referring the parties to arbitration, the Court can continue to exercise jurisdiction in the suit.

Moreover, the cause of action in this application is with regard to invocation of a bank guarantee.

A bank guarantee is separate from the main contract.

Therefore, prima facie the arbitration clause in the main contract may not affect the suit restraining invocation of the bank guarantee, only.

Next I come to the merits.

The main contract was executed in the name of the President of India by an officer of the Union of India.

The bank guarantee was furnished for that particular contract.

It was stated in the fiRs.line of the bank guarantee that it was being furnished in consideration of the President of India.

entering into the above contract.

This bank guarantee was invoked by the letter dated 23rd April, 2012 being Annexure-S at page 101 by the Executive Engineer.

Mr.Mitra is right in his submission that such invocation should have been made in the name of the President of India.

This is a highly technical defect but these technicalities should have been known and is deemed to be known by any public servant.

Article 77 of our Constitution is very clear that any executive action by the Government is in the name of the President of India but executed by some officer authorised by him.

The second point is regarding the terms of invocation.

Clause 2 of the bank guarantee provides as follows : We State Bank of India, Commercial Branch, Alipore, Kolkata do hereby undertake to pay the amounts due and payable under this Guarantee without any demur, merely on a demand from the Government stating that the amount claimed as required to meet the recoveries due or likely to be due from the said Contractor[s].Any such demand made on the bank shall be conclusive as regards the amount due and payable by the bank under this guarantee.

However, our liability under this guarantee shall be restricted to an amount not exceeding Rs.35,00,000.00 [Rupees Thirty five lac only]..

I find nothing in the letter of invocation of 23rd April, 2012 suggesting the above made of invocation.

This is also a highly technical point taken by Mr.Mitra but a bank guarantee has to be invoked strictly in terms thereof.

There is no doubt that this bank guarantee is an unconditional bank guarantee but prima facie it has not been invoked according to the terms by making a statement that the amount claimed as required to meet the recoveries due or likely to be due from the said Contractor[s]..Therefore, prima facie the invocation of the bank guarantee is bad.

There is no point in filing affidavits in this application, as agreed by the learned counsel for the Union of India.

All the relevant papers are on record.

I dispose of the application being TA No.57 of 2012 by passing an order of injunction in terms of prayer [a].of the Notice of Motion.

For the identical reasons the application being TA No.43 of 2012 is also disposed of by passing an order of injunction in terms of prayer [c].of the Notice of Motion.

As affidavits have not been filed, the allegations contained in the respective petition are deemed not to have been admitted.

This will not preclude the Union of India to make a fresh invocation in accordance with law.

All parties concerned are to act on a signed photocopy of this order on the usual undertakings.

(I.

Pkd.P.MUKERJI, J.)

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